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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11

12 BARRY ROSEN,
13 Plaintiff,
14 v.
15 AMAZON.COM, INC., et al.,
16 Defendant.

Case No. 14-cv-02115-ABC-E

Related and Consolidated for Trial with
Case: 12-cv-10413-ABC-E

**DEFENDANT AMAZON.COM'S
REPLY TO PLAINTIFF ROSEN'S
OPPOSITION TO MOTION TO
DISMISS**

DATE: June 2, 2014
TIME: 10:00 a.m.
DEPT.: Courtroom 680
JUDGE: Hon. Audrey B. Collins

ACTION FILED: March 20, 2014

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REPLY ON MOTION TO DISMISS
CASE NO. 14-CV-02115-ABC-E
RELATED CASE: 14-CV-10413-ABC-E

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1 **I. INTRODUCTION**

2 In response to the motion to dismiss, Plaintiff has dropped his direct
3 infringement claim against Amazon. His claim is reduced to speculation that there
4 might have been some instance of a direct infringement by a user for which
5 Amazon should be secondarily liable under one of the frameworks of service
6 provider liability. None of his speculations, however, can support a viable claim
7 for relief.

8 Plaintiff's real gripe is that Amazon allowed an image and defunct detail
9 page to persist on a server after it received Plaintiff's takedown notice. After
10 Amazon received the notice and the buy link on the detail page was deactivated,
11 however, the image and detail page were unindexed and unsearchable by the public.
12 Compl. ¶¶ 11-18. One would have needed to (1) have saved the URL before the
13 link was deactivated and became unsearchable (2) somehow know that the images
14 could still theoretically be available via the URL, and (3) have an interest or motive
15 to view the small images specifically on Amazon's website, when he could have
16 viewed the image through far easier means (such as by searching on Google).
17 Plaintiff has no plausible basis to believe that anyone (other than himself) ever
18 actually accessed those images after his notice. Theoretical injury is insufficient to
19 state a claim. In this situation, the law recognizes no injury, finds no liability, and
20 awards no remedy.

21 Plaintiff's opposition catalogs irrelevant criticisms of Amazon, faulting it for
22 everything from allowing merchants to upload images, to providing consumers
23 their purchase histories, to charging merchants fees, and much more. But that is not
24 copyright infringement. Decades of precedent have crafted a careful balance that
25 allows new technologies to co-exist with the rights of artists and authors like
26 Plaintiff. As a matter of copyright law, the present Complaint fails to state a claim
27 on which relief can be granted. It should be dismissed for three reasons:

28 **First**, the mere "availability" of a file on a web server in an unindexed,

1 unsearchable state does not qualify as direct infringement such that a service
 2 provider might be automatically liable as a contributory infringer simply by being
 3 given notice of the file. Secondary liability requires a direct infringement, and
 4 Ninth Circuit authority requires actual *communication* of copyrighted data to find
 5 direct infringement liability. The out-of-circuit “making available cases” are not
 6 law here; and even if they were, they all involved works that *were* indexed and
 7 searchable, which Plaintiff concedes was not the case here. Plaintiff resorts to a
 8 Copyright Office notice and a partisan industry group memo to prove his point, but
 9 these documents do not change the current state of the law. Thus, Plaintiff’s core
 10 theory of liability—that Amazon is “contributorily liable” because it received a
 11 notice and in response it disabled access to but did not completely erase the files on
 12 its server—fails as a matter of law.

13 **Second**, Plaintiff’s assertions that there *may* have been an actual distribution
 14 of the photo when the file was not publicly searchable—perhaps through Pinterest,
 15 Facebook, or an Amazon purchase history—is precisely the sort of wishful
 16 speculation that *Twombly* and *Iqbal* say may not be used to unlock the doors of
 17 discovery. Plaintiff’s opposition is incorrectly premised on the *Conley* “no set of
 18 facts” test (*see* Opp. at 8), which the Supreme Court explicitly overturned in
 19 *Twombly* and *Iqbal*. No matter how many times Plaintiff may call his speculation
 20 “plausible,” he cannot make it so.

21 **Third**, independent of Plaintiff’s failure to adequately plead direct
 22 infringement, Plaintiff has also failed to plead the requirements for secondary
 23 liability against a service provider. His Opposition concedes that the Amazon
 24 employee’s email response to his notice shows that Amazon lacked the actual
 25 knowledge required for “contributory infringement,” and further concedes that his
 26 own tactical silence *perpetuated* Amazon’s lack of knowledge, which is grounds for
 27 estoppel. Plaintiff all but gives up on his “inducement” theory of liability. And he
 28 fails to plead the practical control and direct financial benefit necessary for service

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1 provider “vicarious liability.”

2 As the Complaint fails to plead an instance of actual direct infringement for
3 which Amazon can be liable under some cognizable theory of secondary liability, it
4 should be dismissed with prejudice on these multiple alternative grounds.

5 **II. PLAINTIFF CONCEDES THAT HE HAS NO CLAIM FOR DIRECT**
6 **INFRINGEMENT AGAINST AMAZON.**

7 In a footnote, Plaintiff makes the evasive concession that “Plaintiff does not
8 intend to assert claims for direct copyright infringement against Amazon.com
9 except in that Amazon very likely and quite plausibly viewed the Photograph post-
10 DMCA Notice.” Opp. at 10, n.7. Thus, it is unclear whether Plaintiff has actually
11 dropped his direct copyright infringement claims against Amazon, and what he
12 believes his true and meritorious allegations against Amazon to be. Such
13 evasiveness is insufficient to state a claim for relief and reveals that Plaintiff has no
14 basis to allege that Amazon has any infringement liability, whether direct or
15 secondary.

16 Plaintiff complains that Amazon likely viewed the image post-DMCA notice.
17 Of course Amazon viewed the image; so has everyone involved in this litigation,
18 since Plaintiff attached the photograph to his Complaint. Secondary liability case
19 law contemplates that a service provider should “reasonably verify a claim of
20 infringement,” which would be impossible without examining the material.
21 *Religious Tech. Ctr. v. Netcom On-Line Commc’n*, 907 F. Supp. 1361, 1374 (1995)
22 [*Netcom*]. Similarly, reviewing and attaching copies of copyrighted materials in
23 connection with bona fide legal proceedings is considered a fair use. *See 4 Nimmer*
24 *on Copyright* §13.05[D][2] (2013) (“Works are customarily reproduced in various
25 types of judicial proceedings, including obscenity and defamation actions, to say
26 nothing of copyright infringement actions, and it seems inconceivable that any
27 court would hold such reproduction to constitute infringement either by the
28 government or by the individual parties for offering the work in evidence.”) (citing

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1 *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 (9th Cir. 1992)); *see also*
 2 *Am. Inst. of Physics v. Winstead PC*, 2013 WL 6242843, at *13 (N.D. Tex. Dec. 3,
 3 2013) (holding that copying journal articles to show prior art in patent proceedings
 4 is fair use).

5 Despite the concession, Plaintiff elsewhere makes much of the initial upload
 6 by History of the Game, alleging “Amazon *itself* copies the images to store on its
 7 servers.” Opp. at 11 (emphasis added). However, any such automated copying by
 8 Amazon’s servers cannot violate his reproduction right because it is non-volitional.
 9 *See Netcom*, 907 F. Supp. 1361 at 1369-70 (service provider not “directly liable for
 10 copying that is automatic and caused by a subscriber” due to a lack of volitional
 11 conduct); Mot. at 8 (collecting authorities). Plaintiff does not attempt to rebut this
 12 well-settled authority cited in Amazon’s opening brief.

13 Recognizing that his direct infringement claim against Amazon is baseless,
 14 Plaintiff is left with his claims of secondary liability. Plaintiff advances a variety of
 15 secondary liability theories, and searches far and wide for some direct infringement
 16 by a user on which to base these, but all of these combinations fail.

17 **III. PLAINTIFF FAILS TO STATE A CLAIM FOR CONTRIBUTORY** 18 **INFRINGEMENT AGAINST AMAZON.**

19 Plaintiff fails to state a claim that Amazon can be liable for any alleged direct
 20 infringement by a user under the framework of contributory infringement liability.

21 **A. Amazon Cannot Be Contributorily Liable for the Initial Upload** 22 **By A Third Party User Because There Is No Alleged Basis Of** 23 **Knowledge; The Notice Came Later.**

24 Plaintiff concedes and even emphasizes that the third-party merchant, not
 25 Amazon, initially uploaded the JPEG file, yet tries (in vain) to attach liability for
 26 the upload to Amazon. Opp. at 3; 4. Contributory liability requires “knowledge.”
 27 Much like in his other cases, here Amazon did not have “any other basis for being
 28 aware of the alleged infringement apart from the takedown letter sent by Rosen.”
Rosen v. Hosting Servs., Inc., 771 F. Supp. 2d 1219 (C.D. Cal. 2010). Thus, the

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1 upload of the image by a third-party merchant, which was prior to Mr. Rosen's
 2 notice, cannot serve as the instance of direct infringement for which Amazon may
 3 be held contributorily liable. Opp. at 11. Only "one who, *with knowledge* of the
 4 infringing activity, induces, causes or materially contributes to the infringing
 5 conduct of another, may be held liable as a 'contributory infringer.'" *Perfect 10,*
 6 *Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007) (emphasis added)
 7 (citing *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159,
 8 1162 (2d Cir. 1971)). For this same reason, Plaintiff may not hitch any pre-notice
 9 direct infringement by a user (*i.e.*, a view of the Kournikova detail page or sale of
 10 the photo) to the contributory infringement framework—there is no basis to plead
 11 knowledge against Amazon.¹

12 **B. After The Notice, Amazon's Employee Believed That The Matter**
 13 **Had Been Resolved.**

14 Contributory infringement in the context of cyberspace requires "*actual*
 15 knowledge that specific infringing material is available using [a] system..." *Perfect*
 16 *10*, 508 F.3d at 1172 (emphasis added). The only basis for *actual* knowledge of
 17 specific infringement pled in the Complaint is the notice that Plaintiff sent to
 18 Amazon. Once the Kournikova buy link was removed, however, the detail page
 19 was no longer indexed or searchable, and the Amazon employee's email response
 20 to Plaintiff shows a belief that the matter had thus been brought "to a close."
 21 Compl., Exh. 9. Thus, in Opposition, Plaintiff concedes (as he must) that Amazon
 22 did not have *actual* knowledge of his remaining concern that the image persisted on
 23 a detail page or image server that was neither indexed nor searchable using
 24 Amazon's search engine. While Plaintiff was not *obligated* to send a second notice,

25 ¹ If Plaintiff intends to argue that once Amazon received the notice, it became
 26 retroactively liable for the user's initial upload, this argument is a non-starter.
 27 *Faulkner v. Nat'l Geographic Soc'y*, 211 F. Supp. 2d 450 (S.D.N.Y. 2002) (The
 28 knowledge "prong is satisfied if the defendant 'knew or should have known' of the
 infringing activity *at the time of its material contribution.*") (emphasis added). A
 service provider should take "simple measures to prevent *further* damage" to a
 plaintiff's copyright. *Perfect 10*, 508 F.3d 1146 at 1173 (emphasis added).

1 a Plaintiff must plead knowledge to prove contributory infringement, and this he
2 has not done.

3 **C. Plaintiff Is Estopped Because His Own Silence Created This**
4 **Situation.**

5 As set forth in Amazon's opening papers (Mot. at 11:20-12:2) (and
6 un rebutted by Plaintiff's opposition), under *Field v. Google, Inc.*, 412 F. Supp. 2d
7 1106 (D. Nev. 2006), Plaintiff is estopped from making any copyright infringement
8 claims against Amazon because "he has aided the defendant in infringing or
9 otherwise induced it to infringe or has committed covert acts such as holding
10 out...by silence or inaction." *Id.* at 1116. Plaintiff's own "silence" and "inaction,"
11 when faced with Amazon's response that it believed the matter was resolved,
12 "aided" and "induced" Amazon to maintain the status quo after the buy link and
13 detail page were made inaccessible; thus the *Field* rule of estoppel bars Plaintiff's
14 claim.

15 In *Field*, the Plaintiff knew that Google would automatically allow access to
16 his copyrighted works through "cached" links when he posted them on the Internet,
17 unless he instructed otherwise. *Id.* at 1117. But Field remained silent regarding his
18 unstated desire not to have "cached" links provided to his website and failed to
19 provide the required instructions. *Id.* His claim was barred. Similarly, here, Mr.
20 Rosen chose to remain silent when faced with a clear indication of Amazon's belief
21 that his matter was resolved. Perversely, Plaintiff now uses his silence to claim that
22 Amazon "knowingly refused" to remove the image from the (unsearchable) product
23 detail page. Yet the email attached to his own Complaint demonstrates that
24 Amazon believed the images were removed. Far from the deliberate indifference
25 he claims, at most Amazon made a mistake that Plaintiff could have corrected with
26 a simple email that could have avoided litigation altogether.² Because his silence

27 ² Indeed, his attorney could have sent such a note given the pendency of the related
28 action against Amazon, but instead opted to file a complaint without even notifying
Amazon's counsel.

1 prevented a full resolution of his remaining concern, Plaintiff is estopped from
2 asserting contributory infringement.

3 **D. The Post-Notice Availability and Persistence of the File In an**
4 **Unindexed, Unsearchable State Does Not Satisfy The Requirement**
5 **For An Actual Act of Direct Infringement.**

6 Mr. Rosen's core theory of liability appears to be that the image persisted on
7 Amazon's servers after he provided notice to Amazon of its presence. But Plaintiff
8 nowhere alleges that any user *actually* accessed the image after Amazon received
9 (and acknowledged) the notice. To the contrary, Plaintiff concedes that once the
10 buy link to the photo was removed, the deactivated detail page and the JPEG on
11 Amazon's internal image server were no longer indexed and no longer searchable
12 via Amazon's search engine.

13 Plaintiff contends that because the image file persisted on a server, it was
14 "available" to a member of the public who might have saved the URL from before
15 and that this availability alone constitutes direct infringement. This theory of
16 "hypothetical" infringement is contrary to the un rebutted Supreme Court and Ninth
17 Circuit authority cited by Amazon in its opening papers, all of which have required
18 *actual* infringement. Even under the *Hotaling* "making available" case cited by
19 Plaintiff and the few cases that have followed it (which are not law in this Circuit),
20 the work complained of must at least be indexed and searchable by the public,
21 which the image here undisputedly was not.

22 **1. The Fourth Circuit *Hotaling* Case Is Not Law In This**
23 **Circuit and Is Inapposite On These Facts.**

24 Plaintiff cites the Fourth Circuit case of *Hotaling v. Church of Jesus Christ of*
25 *Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997) to support his argument that the
26 "making available" of an image may constitute an "actual" distribution that violates
27 the Copyright Act.

28 As a preliminary matter, *Hotaling* has not been followed by the Ninth
Circuit, and has been expressly rejected by most courts that have considered it. *See*

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1 *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 802-05 (N.D. Cal. 2005)
 2 (criticizing *Hotaling* as being “contrary to the weight of [other] authorities” and
 3 “inconsistent with the text and legislative history of the Copyright Act of 1976”);
 4 *Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 623 (6th Cir.
 5 2004) (mentioning and declining to follow *Hotaling*); *Nat’l Car Rental Sys., Inc. v.*
 6 *Computer Assocs. Int’l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993) (stating that
 7 infringement of the distribution right requires the actual dissemination of copies of
 8 phonorecords); *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1225 (D.
 9 Minn. 2008) (finding *Hotaling* is not binding upon the Court and is inconsistent
 10 with “a logical statutory interpretation of § 106(3), the body of Copyright Act case
 11 law, and the legislative history of the Copyright Act”); *Elektra Entm’t Grp., Inc. v.*
 12 *Barker*, 551 F. Supp. 2d 234, 243 (S.D.N.Y. 2008) (finding that only “a small
 13 number of courts” follow *Hotaling*’s “make available” theory and declining to
 14 follow the theory because it is not “faithful to the statute,” which “itself contains no
 15 ‘make available language in its definition of distribution or publication’”).

16 But even if *Hotaling* were valid law in the Ninth Circuit, it does not support
 17 Plaintiff’s argument; Plaintiff misunderstands its holding and misapplies it here. In
 18 *Hotaling*, a library had an unauthorized copy of a book, which it had indexed and
 19 made searchable in its card catalog system. 118 F.3d 199 at 201. The library
 20 argued that without a showing that any member of the public actually read the
 21 book, it could not be liable for “distribution.” *Id.* at 201-203. The court found that
 22 the library had “made available” the work by “adding it to its collection and listing
 23 it in its index or catalog system,” and that therefore “it had completed the steps
 24 necessary for distribution to the public.” *Id.* Thus, the key was that the library
 25 indexed the book and made it searchable for the public.

26 By contrast, here, Plaintiff concedes that the detail page and Kournikova
 27 JPEG were no longer indexed or searchable after Amazon received notice and the
 28 buy link was deactivated. In actuality, Amazon’s servers made the image

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1 unavailable, and Amazon did *not* “complete the steps necessary for distribution to
 2 the public.” Unlike in *Hotaling*, no member of the public could have found the
 3 image by browsing Amazon’s site or by specifically searching for it on Amazon’s
 4 search engine. Only someone who had saved the URL, *i.e.* Plaintiff, could access
 5 it.

6 The Southern District of California in *Perfect 10 v. Rapidshare A.G.* drew
 7 this very same distinction: where a webhost does not make files indexed or
 8 searchable, distribution may not be “deemed.” 2010 U.S. Dist. LEXIS 146053
 9 (May 18, 2010), Order Denying Plaintiff’s Motion for Preliminary Injunction
 10 [*Rapidshare*]. In *Rapidshare*, Perfect 10 sued Rapidshare, a file-sharing website
 11 where users could upload and download files, for direct infringement under a
 12 “making available” theory. But the court found that Perfect 10 had failed to show
 13 Rapidshare should be liable for deemed distribution because:

14 The public cannot enter rapidshare.com and browse through a
 15 catalog for desired materials as the library visitors could in
 16 *Hotaling*. See 118 F.3d at 203 (concluding that “[w]hen a
 17 public library adds a work to its collection, lists the work in its
 18 index or catalog system, and makes the work available to the
 19 borrowing or browsing public, it has completed all the steps
 20 necessary for distribution to the public”). Additionally, a
 21 RapidShare user cannot find files located on RapidShare’s
 22 servers in the same way as a Napster user could find a specific
 23 song from a peer’s library because RapidShare does not index
 its files. See *Napster*, 239 F.3d at 1012 (stating that “the user
 can access an index of all MP3 file names in a particular
 hotlisted user’s library and request a file in the library by
 selecting the file name”). Because the Court concludes that
 RapidShare does not make infringing material available in the
 same way or to the same extent as the library in *Hotaling* or the
 users in *Napster*, the Court declines to hold RapidShare liable
 for direct infringement on a theory of deemed distribution.
Id. at 5-6.

24 Because it is undisputed that the JPEG, which had been uploaded by a third-party
 25 merchant, was no longer indexed nor could have been located by using Amazon’s
 26 search engine after the buy page was removed, under *Rapidshare*’s holding,
 27 *Hotaling* and its progeny are inapposite on these facts.

28 The Copyright Notice cited by Plaintiff also recognizes this key aspect of

1 *Hotaling*. See Dkt. 24-1 (“The [*Hotaling*] court found that making a work available
 2 to the public constituted distribution where a “public library adds a work to its
 3 collection, *lists the work in its index or catalog system*, and makes the work
 4 available to the borrowing or browsing public”; “The Ninth Circuit in *A&M*
 5 *Records v. Napster, Inc.* concluded that “Napster users who *upload file names to*
 6 *the search index* for others to copy” have effectively made these files available.)
 7 (emphases added). Plaintiff himself cites the *Napster* language in his Opposition.
 8 Opp. at 12. Thus, even if “making available” liability were the law, it would not
 9 apply here.³

10 2. **The Controlling Supreme Court and Ninth Circuit** 11 **Precedent Undisputedly Require Actual Distribution.**

12 Putting aside for a moment factually inapposite out-of-circuit case law, the
 13 Supreme Court and Ninth Circuit have unwaveringly required a showing of
 14 “actual” acts of direct infringement. See *Metro-Goldwyn-Mayer Studios, Inc. v.*
 15 *Grokster, Ltd.*, 545 U.S. 913, 940 (liability of a peer-to-peer file-sharing network
 16 “of course” requires evidence of actual infringement by recipients of the device);
 17 *Columbia Pictures Indus., Inc. v. Fung*, 710 F. 3d 1020, 1034 (9th Cir. 2013)
 18 (requiring “evidence of actual infringement” by users of Defendant’s peer-to-peer
 19 related services; “uploading and downloading copyrighted material are infringing

20 _____
 21 ³ The lobbyist group’s response to this Notice attached to Plaintiff’s Opposition
 22 (Opp. Exh. 2) is one of nearly thirty responses by various partisan groups. It is
 23 unclear what Plaintiff hopes to prove by attaching these documents. That Congress
 24 may be in the early stages of considering a possible modification to the Copyright
 25 Act has no bearing on the outcome of this motion. A court adjudicating a present
 26 dispute cannot anticipate what Congress might do in the future. In *Sony Corp. of*
 27 *Am. v. Universal City Studios*, 464 U.S. 417 (1984), the Supreme Court recognized
 28 “it is Congress that has been assigned the task of defining the scope of the limited
 monopoly that should be granted to authors or to inventors in order to give the
 public appropriate access to their work product.” *Id.* at 429. In refusing to expand
 the scope of copyright protection as requested by Plaintiff with respect to the then
 nascent VCR technology, the Court held, “It may well be that Congress will take a
 fresh look at this new technology, just as it so often has examined other innovations
 in the past. But it is not our job to apply laws that have not yet been written.” *Id.* at
 456. The same principle of restraint applies here with respect to Congress’ present
 attempts to address the complex issues surrounding Internet service providers.

1 acts”; finding that where 90-96% of files available on the network were infringing
 2 and defendant did “not attempt to rebut the factual assertion that his services were
 3 widely used to infringe,” the actual infringement requirement was satisfied).⁴
 4 Plaintiff does not dispute that “actual distribution” is the controlling law of this
 5 circuit. Thus, a hypothetical distribution is insufficient.

6 An actual distribution would require that Amazon actually “communicated”
 7 the image per *Perfect 10 v. Amazon*. Plaintiff misleadingly states that *Perfect 10*
 8 held that *storage* alone of a copyrighted work counts as a distribution; *Perfect 10*
 9 clearly required both storage and *communication*. *Perfect 10, Inc. v. Amazon.com*,
 10 508 F.3d at 1159-61 (“Google does not own a collection of Perfect 10’s full-size
 11 images and does not *communicate* these images to the computers of people using
 12 Google’s search engine”; “the owner of a computer that does not store *and serve*
 13 the electronic information to a user is not displaying that information”) (emphasis
 14 added).

15 Plaintiff’s Complaint theory that the mere persistence of the image file on an
 16 Amazon server can constitute direct infringement, absent any allegation of an actual
 17 communication of the image file fails, and Amazon cannot be held liable as a
 18 contributory infringer for such a “hypothetical” direct infringement.

19 **E. Plaintiff Incorrectly Relies on the Overturned Pre-*Twombly***
 20 **Motion to Dismiss Standard And Requests Discovery Based on**
 21 **Speculations.**

22 Recognizing the lack of actual, relevant facts in his Complaint, Plaintiff adds
 23 a host of speculations as to what discovery *might* show. However, Plaintiff
 24 incorrectly relies on the pre-*Twombly* standard from *Conley v. Gibson* which stated
 25 that a complaint could not be dismissed “unless it appears beyond doubt that [he]

26 ⁴ The Copyright Office Notice cited by Plaintiff also recognizes that courts in the
 27 Ninth Circuit have “relied on the language of [the Copyright Act] to require *actual*
 28 distribution in order to find a violation of [the distribution] right.” *Id.* Dkt. 24-1.
 Here, it cites many of the same cases cited above, such as *Atl. Recording Corp. v.*
Howell, 554 F. Supp. 2d 976, 983 (D. Ariz. 2008) (“Merely making an
 unauthorized copy of a copyrighted work available to the public does not violate a
 copyright holder’s exclusive right of distribution.”). *Id.*

1 can prove no set of facts in support of his claim which would entitle him to relief.”
 2 Opp. at 8 (relying on pre-*Twombly* cases). The Supreme Court in “*Twombly* retired
 3 the *Conley* no-set-of-facts test.” *Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009); *Bell*
 4 *Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007) (“The ‘no set of facts’ language
 5 has been questioned, criticized, and explained away long enough by courts and
 6 commentators, and is best forgotten as an incomplete, negative gloss on an accepted
 7 pleading standard.”). Under the present day controlling standard for a motion to
 8 dismiss, absent “a plausible claim for relief,” and “where the well-pleaded facts do
 9 not permit the court to infer more than the mere possibility of misconduct,” a court
 10 will “not unlock the doors of discovery.” *Iqbal*, 556 U.S. at 678-79.

11 In its Opposition, Plaintiff tacks on a series of new, implausible speculations
 12 that offer nothing more than the *possibility* of an actual distribution:

- 13 • Plaintiff speculates that a copy of the photo *may* have been sold, and if one
 14 had been sold, then purchasers could view the image in their purchase history
 15 after the buy link was removed. Opp. at 3. Yet, it remains speculation that
 16 the image was ever sold, and it is another speculation that if there was a sale,
 17 the purchaser engaged in the unusual behavior of repeatedly viewing their
 18 purchase history. In any case, this photograph was never sold – either before
 19 or after Plaintiff’s notice.
- 20 • Plaintiff now asserts that the image *may* have been distributed to others on
 21 the World Wide Web through “email, Facebook, Twitter and Pinterest.”
 22 Opp. at 3. Yet, logically speaking, sharing of this kind – if it happened
 23 before the notice, would have been without Amazon’s knowledge; and after
 24 the notice, it could have occurred only if someone had previously saved the
 25 URL, and then directly accessed it by URL later, an occurrence that Plaintiff
 26 concedes is implausible in light of the far easier means of retrieving these
 27 pictures.⁵

28 ⁵ These new allegations were not present in the Complaint and contradict Plaintiff’s
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1 These implausible additions to the Complaint are insufficient to satisfy the
 2 *Twombly* and *Iqbal* pleading standard. Dismissal is proper.

3 **F. The DMCA Safe Harbor Is Not At Issue Here.**

4 Plaintiff repeatedly emphasizes that Amazon does not qualify for the DMCA
 5 safe harbor, but Amazon is not asserting, *yet*, that the DMCA safe harbor applies.
 6 The DMCA safe harbor is an *affirmative defense* whose merits may be determined
 7 at summary judgment or trial. Amazon here contends that the Complaint fails to
 8 state a *prima facie* case of secondary liability. By trying to defeat this motion based
 9 on the DMCA safe harbor, Plaintiff is effectively trying to transform a shield for
 10 service providers into a sword for copyright holders; the warped logic is that if a
 11 service provider does not qualify for a limitation on liability, therefore, it must have
 12 infringed. *See* 17 U.S.C. § 512(l) (whether or not service provider is entitled to safe
 13 harbor “shall not bear adversely upon the consideration of a defense by the service
 14 provider that the service provider’s conduct is not infringing under this title or any
 15 other defense”).

16 Plaintiff’s unexplained statement that a “DMCA notice is not even required”
 17 (Opp. at 9, Sec. B) is also highly misleading. Any plaintiff attempting to hold a
 18 party (such as a service provider) liable for contributory infringement must provide
 19 some basis to show that the service provider had actual knowledge of the direct
 20 infringement on which liability is predicated. Here, the DMCA notice is the only
 21 claimed basis of knowledge regarding the Kournikova photo. Thus, there can be no
 22 liability for the time period before it was sent.

23 **IV. PLAINTIFF HAS EFFECTIVELY CONCEDED HIS INDUCEMENT**
 24 **THEORY.**

25 Recognizing that his inducement theory is feeble because he cannot show
 26 that Amazon had the specific intent necessary for inducement liability, Plaintiff’s
 27

28 concession in the parties’ meet and confer that Plaintiff does not know of any actual
 distribution (other than to Mr. Rosen himself) after the buy link was removed.

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1 opposition barely attempts to defend this theory. *See Grokster*, 545 U.S. at 919
 2 (demanding a showing of a specific intent as manifested by “clear expression or
 3 other affirmative steps taken to foster infringement”). Instead, he advances
 4 conspiracy-like theories of Amazon’s intent to infringe by, for example, pointing to
 5 Amazon’s sitewide image standard. Amazon’s sitewide image standard states,
 6 “Images must have white backgrounds and cannot contain inset images,
 7 watermarks, or unauthorized content.” Exh. 14, at 1. This policy clearly aims to
 8 *prevent* the uploading of unauthorized content (which often contains watermarks).
 9 Yet Plaintiff takes the *prohibition* of watermarks out of context and argues that
 10 such a policy “encourages users to remove copyright management information prior
 11 to upload.” Opp. at 16.

12 Plaintiff continues to suggest that Amazon’s policy of requiring merchants to
 13 post pictures of the products they offer for sale somehow assists or causes
 14 infringement. This is clearly a content-neutral policy that any online retailer would
 15 enact. Plaintiff also tacks on the allegation that Amazon requires users to post these
 16 images at “relatively large sizes.” Opp. at 16. It is unclear why the size of the
 17 image is relevant; even if it were, the size of the Kournikova image on Amazon’s
 18 server could hardly be an effective vehicle for infringement: at Plaintiff’s alleged
 19 267x400 pixels (Compl. ¶ 12), the image is about the size of a Post-It note.

20 These examples do not set forth the “clear expression” of intent to foster
 21 infringement required by *Grokster*. In fact, these arguments are designed to create
 22 “suspicion,” which *Twombly* admonishes against. *Twombly*, 550 U.S. at 555.
 23 Amazon’s policies expressly prohibit intellectual property infringement, and it is
 24 implausible that such policies secretly aim to incite infringement.

25 **V. THE COMPLAINT FAILS TO ALLEGE VICARIOUS LIABILITY.**

26 **A. Amazon Has No Practical Ability to Control Infringement.**

27 Plaintiff fails to address controlling Supreme Court and Ninth Circuit
 28 authorities on vicarious liability, which require that a plaintiff show “the right and

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1 ability to *supervise* the direct infringer,” *see Grokster*, 545 U.S. at 930 n.9
 2 (emphasis added), which requires a *practical* ability to control, *Perfect 10*, 508 F.3d
 3 at 1173. Nor can he dispute that dismissal at the 12(b)(6) stage is proper when this
 4 standard is not met. *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068 (9th
 5 Cir. 2013). Plaintiff does not explain how Amazon’s practical ability to assess the
 6 copyright status of every product and every image that users post on its platform is
 7 different from that of Google in *Perfect 10*. *Perfect 10*, 508 F.3d at 1174 (“Without
 8 image-recognition technology, Google lacks the practical ability to police the
 9 infringing activities of third-party websites.”) Nor is Mr. Rosen in a different a
 10 position than the Plaintiff in *Luvdarts*, who failed to propose an implementable
 11 system for mobile carriers to detect infringement. Plaintiff alleges that the mere
 12 ability to terminate users satisfies the “right and ability to control” prong of
 13 vicarious liability, but all service providers have this ability. This does not
 14 constitute practical control over *infringement*.

15 In other words, Amazon, through its policies tries to prevent the upload of
 16 infringing material, but it does not have the practical ability to stop the uploading of
 17 potentially infringing material before it happens. Therefore, it cannot be liable on a
 18 vicarious liability theory for the initial upload by the third-party merchant. *See*
 19 *Perfect 10*, 508 F.3d at 1173-74 (“Google’s right to terminate an AdSense
 20 partnership does not give Google the right to stop direct infringement by third-party
 21 websites.”).

22 **B. Plaintiff Has Further Failed to Allege That Amazon Receives a**
 23 **Direct Financial Benefit from Users’ Infringing Conduct.**

24 Plaintiff cannot and has not argued that users come to Amazon’s website
 25 with the object of viewing or downloading infringing photos, or that Amazon seeks
 26 to profit from infringing downloads (as in the dissimilar context of peer-to-peer file
 27 sharing networks like the one in *Napster*). Charging fees for an online service that
 28 a few may wrongfully use for infringement does not of itself constitute a “direct

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1 financial benefit.” If it were, then the Ninth Circuit would not have ruled in favor
 2 of AOL as it did in *Ellison v. Robertson*, 357 F. 3d 1072 (9th Cir. 2004). There it
 3 was undisputed that AOL received fees and “profit[ed] from subscriptions,” and
 4 there were instances of direct infringement by some users. *Id.* at 1079. Yet this
 5 was not enough, because the legal standard looks to whether “the infringing activity
 6 constitutes a draw for subscribers, not just an added benefit.” *Napster*, 239 F.3d at
 7 1023. Plaintiff highlights Amazon’s supposed admission that photos are needed to
 8 induce people to buy products (Opp. at 19), but this is irrelevant. Plaintiff ignores
 9 the salient point that people do not visit Amazon’s website in order to view or
 10 download infringing images, and Amazon certainly does not profit from these
 11 views even if they do occur. Plaintiff fails the direct financial benefit prong of the
 12 vicarious liability standard for this reason alone.⁶

13 **VI. CONCLUSION**

14 Plaintiff in his opposition has ceded his direct infringement claim against
 15 Amazon. His theories of secondary infringement fails to state a claim on which
 16 relief may be granted. Thus, for each of the foregoing reasons, all claims should be
 17 dismissed.

18 Dated: May 19, 2014

Respectfully submitted,

19 FARELLA BRAUN + MARTEL LLP

20
 21 By: /s/ Deepak Gupta
 22 Deepak Gupta

23 Attorneys for Defendant
 24 AMAZON.COM, INC.

25
 26 ⁶ To the extent Plaintiff is contending that his takedown notice provided Amazon
 27 with the “practical ability” to control the infringement, then (a) as explained in
 28 Section III(D), above, he fails to plead an actual direct infringement after that time,
 and (b) by deactivating the buy link, any direct financial benefit was severed (*see*
 Mot. at 15-16).